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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 243

F. E. GOODING AND ELIZABETH GOODING, *Petitioners*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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Petitioners F. E. Gooding and Elizabeth Gooding pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in F. E. Gooding v. United States (No. 165-59) and Elizabeth Gooding v. United States (No. 166-59) on January 24, 1964, as amended on April 3, 1964.

CITATION TO OPINION BELOW

These cases were consolidated for hearing in the Court below, Case Number 165-59 and Case No. 166-59, not yet officially reported.

The opinion and judgment of the Court of Claims was decided January 24, 1964. It is set out in

Appendix A, infra, p. 1a to p. 18a. An order denying defendants request for a re-hearing and amending the original decision was entered April 3, 1964. It is set out in Appendix A, infra, p. 18a to p. 19a.

JURISDICTION

The judgment of the Court of Claims (opinion Appendix A, p. 1a was entered on January 24, 1964, and a timely motion for rehearing was filed by defendant.

The judgment of the court amending the original decision and denying rehearing (opinion Appendix A, infra, p. 18a) was entered April 3, 1964. This Court has jurisdiction under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. If the mitigation statutes are found applicable, should not a capital gains tax paid on what was later determined as a tax-free organization be refunded in toto?

2. In interpreting the mitigation statutes should the language in Section 1314 (c) which says, "The amount to be * * * refunded, shall not be diminished by any credit or set-off based upon any *item* other than the one which was the subject of the adjustment," be interpreted, to pertain to a tax category and not to the property which is the subject of such tax category? In other words, does the word "item" as used in this section refer to the "item" described on a tax return, in this instance, capital gains, or does it refer to the actual property underlying the application of the tax category so as to fragmatize such "transaction" or "item" into allocable parts as it becomes subject to treatment as a taxable transaction in one or more

future years, requiring as many refund claims as such property might have divisable units of tax treatment from year-to-year?

3. When Congress established the provisions of the mitigation sections did it not intend that they supplement rather than supersede common law recoupment remedies, thus allowing recoupment in toto, where the case involved conforms to all the rules and principles established by the Supreme Court allowing such refunds in full in cases where the government (or the taxpayer) has taken an inconsistent position to the detriment of the other?

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 1311-1314, Internal Revenue Code of 1954, 26 U.S.C. 1958 edition and Treasury Regulations on Income Tax, (1954 Code), Section 1.1312-7 (c).

STATEMENT OF THE CASE

The facts are not in dispute. Findings of Fact are stated by the Court of Claims following the opinion. Appendix A, infra, pp. 14a to 18a.

The essential facts are as follows:

The petitioners in 1946 transferred assets owned by them in consideration of stock and notes. They treated the notes as boot, under Section 112 (c), Internal Revenue Code of 1939, and reported the resulting capital gain upon their 1946 income tax return. The notes thereby acquired a cost basis in petitioners' hands of a substantial portion of their face value.

In 1947 and 1948 certain of the notes were paid and statisfied. Such payments were treated as a return of capital by plaintiffs. The Commissioner of Internal

Revenue included them in full as taxable ordinary income, and the resulting deficiency in tax was sustained by the Tax Court, whose decision ultimately became final and constituted a final determination of the matter in 1957.

Plaintiffs thereafter with the year 1957 claimed refunds of the capital gains tax paid upon the notes for the year 1946. After denial of the claims in June, 1958, plaintiffs filed suit thereon in this court, praying in the respective petitions for refund of the amount of capital gains tax erroneously and illegally collected from them for the calendar year 1946, and for such relief as may be proper under the laws of the United States. The defendants answered affirmatively that the statute of limitations (Section 3772 (a) (1) and 322 (b) (1) of the Internal Revenue Code expressly barred refunds.

The Court of Claims held that petitioners were entitled to relief under the mitigation statutes as claimed by petitioners. The Court however, diminished and restricted the refund of the capital gains tax claimed to be due and allowed recovery only on that portion of the capital gains tax which was allocable to the three notes paid in 1947 and 1948.

The Court further held, "Finally we hold that plaintiffs cannot have their claim for the remainder of the 1946 tax considered under the doctrine of equitable recoupment," in the belief that since the statute applied, "it intended, we think, that they supersede any common-law recoupment remedies with respect to the categories designated in Section 1312."

The Court based this diminution of the relief prayed for on the construction of Section 1314 (c)

which neither counsel for the plaintiff nor defendant had regarded as applicable and was not in issue in the case.

Counsel for defendant filed an application for rehearing (Appendix B, p. 20a to p. 23a) pointing out that According to Treasury Regulations, that if the mitigation statutes were found applicable, the entire capital gains tax paid in 1946 should be refunded.

The Court of Claims denied the rehearing and amended the decision, (Appendix A, p. 18a to p. 19a) to hold that Treasury Regulations did not apply.

REASONS FOR GRANTING THE WRIT

The Court of Claims in This Case Has Decided An Important Question of Federal Law Which Has Not Been But Should Be Settled By This Court

In compassion toward hardship and unfairness in tax cases the United States Supreme Court established the doctrine of equitable recoupment which applies to allow relief where the bar of the statute of limitations would otherwise permit harsh and unjust treatment to prevail.[1]

Later, the United States Congress enacted statutory sections providing mitigation of the effect of the statute of limitations and it was expressly stated that such legislation was to supplement equitable recoupment principles applied by the Courts.[2]

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[1] Bull v. United States, 295 U.S. 247 (1935).

[2] "Legislation has long been needed to supplement the equitable principles applied by the courts to check the growing volume of litigation by taking the profit out of inconsistency, whether fortuitous or the result of design." S. Rep. No. 1567, 75th Congress, 3d Sess. 49 (1938).

The U. S. Treasury Regulations (Appendix D, p. 30a to p. 31a) clearly indicate that sound accounting principles would require that taxes determined to have been improperly paid in a given year, should be refunded in full, and that the clear intent of the statute means that the "transaction" or "item" in this case is the capital gains tax paid in 1946, and that the refund should not be altered or diminished by any other item in any other year.

The result of the Court of Claims decision in this case would be to force the broad equitable recoupment doctrine into narrow statutory limits, unintended by Congress, and further, to restrict the statutes themselves to a narrow and limited effectiveness creating new hardships by requiring that the refund be fragmentized into a multiplicity of refunds as the property involved became involved in separate taxable transactions in future years. The result also would be to inflict a continuing responsibility for payment of interest upon government or taxpayer, (as the case might be) simply because it was not feasible or convenient to fully dispose of property or consummate transactions in any one given year.

Specifically the hardship in this case, which has already extended over almost two decades, would be repeated in the case of other taxpayers, where the government retains money which taxpayer should have the right to use in his own business, since, in order to have the mitigation statutes or the doctrine of equitable recoupment apply at all, there must have been an illegal tax in prior years.

The United States Supreme Court needs to determine this question which will eliminate unlimited hardship and a multiplicity of tax conflicts.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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